

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HARRY SMITH, JR., and ROSLYN
WOODARD SMITH, individually and as
Administrators of the ESTATE OF HARRY
SMITH, III,

Plaintiffs,

VS. C.A. NO. 04-1254-GMS

CITY OF WILMINGTON, JOHN
CIRITELLA, THOMAS DEMPSEY and
MATTHEW KURTEN,

Defendants.

VIDEOTAPE DEPOSITION
OF
ELBERT WATERS

September 14, 2006

ALPHA REPORTING CORPORATION
236 Adams Avenue
Memphis, Tennessee 38103
(901) 523-8974
www.alphareporting.com

Please note: The page numbers might differ from the printed version of the original transcript. This is an electronic version, sent via E-mail.

21 ELBERT WATERS,
22 having been first duly sworn, was examined and
23 testified as follows:

6

19 Q. When were you first contacted to serve as an
20 expert in this case?

21 A. Approximately three months ago.

22 Q. What were you asked to do?

23 A. I was asked to render an opinion on a police
24 event that involved what appeared to be excessive
25 force and a death.

19

1 Q. Did you write a report?

2 A. Yes, I did.

3 Q. Was -- did you write a report -- only one
4 report or did you write more than one?

5 A. I just wrote one.

6 MR. PARKINS: I'm going to ask
7 the court reporter to mark this as Waters Exhibit
8 1, and then I'll ask you to take a look at it.

9 (WHEREUPON, THE
10 ABOVE-MENTIONED DOCUMENT WAS MARKED AS EXHIBIT NO.
11 1 TO THE TESTIMONY OF THE WITNESS, AND IS ATTACHED
12 HERETO.)

13 BY MR. PARKINS:

14 Q. Would you -- now that you have Waters
15 Exhibit 1 in front of you, would you, first of
16 all, satisfy yourself that this is the report that

17 you wrote and then also tell me if there is
18 anything that you feel should be changed in this
19 report or anything which should be added to this
20 report since you've written it?
21 A. May I have a minute, please?
22 Q. Certainly.

20

6 BY MR. PARKINS:
7 Q. Mr. Waters, do you feel you've had enough
8 time to review the report?
9 A. Yes.
10 Q. The first question I had for you, in fact,
11 is this your report?
12 A. Yes, this is.
13 Q. And the second question I had for you is, is
14 there anything that you want to change or add to
15 the report?
16 A. No, there is not.

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13 Q. Yeah. Now, at some point in time if they
14 viewed Mr. Smith as stopping the car, what should
15 the officers have done?
16 A. Proceeded to walk to him with the weapons in
17 their holsters. Nobody said he had a gun; nobody
18 said he had any kind of weapon that could hurt
19 them other than a scalpel, which was not put on
20 the air, so at this point they had nothing but a
21 stolen car.

22 Q. How do you know it was not put on the air?

23 A. Well, it's based on testimony because in the
24 depositions each one was asked what were you
25 responding to, and each one said a police officer

55

1 had been taken, officer needed help.

2 Q. Well, now, the officers on the scene,
3 Ciritella and?

4 A. Uh-huh (affirmative response).

5 Q. -- knew that shots had been fired; is that
6 correct?

7 A. Yes.

8 Q. And they did not know who fired the shots?

9 A. That's correct.

10 Q. Wouldn't it be reasonable for a police
11 officer under those circumstances to have his
12 weapon unholstered?

13 A. As a matter of fact, quite to the contrary
14 because as a police -- professional police
15 officer, if you're involved with the decision of
16 taking somebody's life, which is the ultimate
17 decision a person can make, you have to have and
18 work on knowledge of facts, not assumptions.

14 A. Well, here's the problem: We're -- there's
15 a critical event that we're overlooking, and that
16 is as he approached the blockade, he all of a
17 sudden received a barrage of gunfire.

18 Q. Who's he?

19 A. Smith.

20 Q. Okay.

21 A. As he was driving. It would seem reasonable
22 to expect that his actions weren't so much to get
23 away, but probably trying to get away from being
24 shot again as opposed to running the blockade at
25 that point; they didn't even give him a chance to

57

1 stop.

20 Q. Okay. Is it your understanding that the car

21 came to stop also on Fifth Street?

22 A. It slowed down.

23 Q. When the car began to slow down, what should
24 the officers have done?

25 A. They should have then tried to stop the car

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1 with the same technique of just halt at the car.

2 See, the timing of the event is such that the car

3 is slowing down. All of a sudden there's a

4 barrage of fire, and the car picks up. He may

5 have wanted to give up at that point, but they

6 didn't give him an opportunity.

7 Q. Okay. What was, in fact, Detective

8 Ciritella doing?

9 A. In fact, what he was doing was standing on

10 the curb waiting for the car to come by so he
11 could shoot him to make him stop. At no point in
12 his testimony did he say -- except when the car
13 was about a half block away, he ordered the car to
14 stop. How could the driver possibly hear with the
15 commotion going on? So this is what I'm saying,
16 the unreasonableness of the actions right there.

17 Q. Okay. Now, do you agree that when the car
18 began to accelerate -- let's assume for the moment
19 that Detective Ciritella said he thought the car
20 was driving at him.

21 A. Yes.

22 Q. Do you agree at that moment that Detective
23 Ciritella had the right to use deadly force?

24 A. Yes.

25 Q. So if the jury were to believe that the

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1 first shot that was fired at Fifth and Harrison
2 Street was fired as the car was apparently
3 approaching Detective Ciritella, you would not
4 fault the police officers for that?

5 A. No, but what happened is he also shot after
6 the car passed.

7 Q. So what you are telling me then is you are
8 not faulting the police officers for initially
9 shooting but only are faulting the police officers
10 for shooting at him after the car passed?

11 A. What I'm saying is this: Ciritella was in

12 the right in the initial shot to protect himself
13 even though he put himself in danger, but once the
14 car passed, he still had nothing but an
15 unauthorized use of a vehicle.

16 Q. Okay. And so you believe that there was an
17 unauthorized use of a vehicle and that they had no
18 right to shoot after the car passed?

19 A. Yes.

20 Q. All right. Now, what is the basis for your
21 testimony that the only crime that had been
22 committed was the unauthorized use of the vehicle?

23 A. The testimonies that they had starting with
24 Whitehead's testimony from the hospital. At no
25 point did they ever say there was a carjacking, a

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1 person shot.

2 Q. All right. What else?

3 A. Basically that's it.

4 Q. Well, let's assume for the moment that the
5 jury were to conclude that Mr. Smith was driving
6 in an attempt to hit Detective Ciritella.

7 A. Yes.

8 Q. Assuming that to be the case.

9 A. Yes.

10 Q. Would you believe that there was more than
11 the unauthorized use of the vehicle?

12 A. Well, Ciritella put himself in danger. He
13 didn't have to stand in front of the car. That

14 was his choice. Just as Mr. Smith had the choice
15 of not stopping at the barricade, he had the
16 choice of not putting himself in the line of
17 danger. It's one thing to be in a situation where
18 you have an offender, they jump in the car and run
19 you over.

20 It's another thing to see a car coming
21 a block away. You put yourself in the middle of
22 the street. You shout to stop knowing they can't
23 hear it, and then you step to the side so that you
24 can shoot into the car.

23 Q. Would you take a look at item No. 3,
24 potential escape routes are limited by the
25 configuration of the city streets?

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1 A. Yes.

2 Q. What is the basis for that opinion?

3 A. The basis for that opinion was looking at
4 the map of the area that was involved, and as I
5 looked at the map from where it began and where it
6 ended, I see that Wilmington is an old city,
7 narrow streets, and I can tell because there are
8 so many one-ways. In most urban districts when
9 you get in the city they're pretty much two-way
10 streets unless it's too narrow or like downtown in
11 the flat out downtown area.

12 As I look the map, I see from the

13 hospital to the conclusion of the event there is
14 nothing but one-way streets, and the problem is
15 that one way is blocked off because you have the
16 expressway so there wasn't too much he could do
17 because of the blockage of the expressway the
18 distance of the expressway.

11 Q. Looking again at Waters Exhibit No. 1 -- and
12 again we're still on page 2 -- item 4, you recite
13 that an adequate number of police officers
14 responded for control and containment and all were
15 in close proximity to the stolen vehicle at all
16 times, either directly behind it, in front of it,
17 or paralleling in movements on adjacent streets.
18 Responding officers were aware of this.

19 How many police officers responded?

20 A. As I remember, it was somewhere in the
21 vicinity of 22 to 24 police officers.

8 Q. Now, if the police officer assumed for the
9 moment that the suspect fired the shots, wouldn't
10 it be fair to assume that the suspect was violent?

11 A. The problem is we're basing this on an
12 assumption. Police officers cannot -- when you're
13 involving deadly force -- assume anything. You
14 have to work on facts, known facts.

20 Q. Okay.

21 A. What I'm trying to explain here is when it
22 comes to the use of deadly force, you can't act on
23 just the assumption that a shot has been fired. A
24 police officer could be pulling his gun out of his
25 holster to threaten to stop somebody and the gun

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1 could go off. Somebody a block away responding
2 can say, wow, I heard a gun shot, shots fired.

1 Q. Did you read any testimony about there was a
2 button on a console that will release the shotgun?

3 A. No, but I did read this.

4 Q. Can you just identify the document? You
5 don't have to read it again unless you want to.

6 A. I didn't see it in here, but every police
7 department that I know secures weapons that are
8 not on a police officer. It's just standard
9 practice.

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10 Q. Okay. But you told us earlier do not fault
11 Ciritella for the firing of the first shot or
12 shots?

13 A. No, what I said was in the position that he
14 was in, he had the right to shoot, but he shot
15 after the car had passed him because the evidence
16 shows that the bullets came in from the side and
17 not the front of the vehicle.

18 Q. Oh, okay. So you believe that he did not
19 shoot when he had a right to do so?

20 A. That's exactly what I'm saying.

18 Q. And what does the Attorney General's report

19 say about that?

20 A. Let's see. It says the stolen police car

21 stopped accelerating and came to a complete stop

22 on Harrison Street approximately 116 feet north of

23 the intersection of Fifth Street.

24 Q. Does it say earlier in that report it was

25 accelerating up Fifth Street -- up Harrison

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1 Street?

2 A. Okay. It says, he continued on and

3 accelerated north on Harrison Street.

4 Q. So you disagree with the Attorney General's

5 report?

6 A. I thought we were talking at the point of

7 the roadblock.

8 Q. No, we're talking about what happened when

9 he hit the parked car.

10 A. All right. The stolen police vehicle slowed

11 down as if to stop near the corner of Fifth and

12 North Harrison, so he's slowing down,

13 deaccelerating (sic) at Harrison and Fifth.

14 The officers approached the vehicle

15 with their service weapons drawn and ordered the

16 victim out of the vehicle. It is at this moment

17 where they started shooting.

18 The victim then accelerated the stolen
19 police vehicle toward Detective Ciritella, who was
20 standing on the side of the street near the curb.
21 Detective Ciritella fired his weapon at the victim
22 and leaped onto the sidewalk.

23 Now, they say that he was slowing down
24 as he was approaching the officers.

25 Q. My question is was he accelerating after he

99

1 hit the parked car?

2 A. Okay. When he -- this is what it says: The
3 victim continued to drive onto the sidewalk, and
4 in an effort to drive to the police roadblock, he
5 rammed a parked Jeep on the corner of Fifth and
6 Harrison Streets. He continued on and accelerated
7 north on Harrison Street.

8 Q. So after he hit the car, according to that
9 report, he accelerated; is that correct?

10 A. He accelerated.

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4 Q. What does the Supreme Court say about that?

5 A. Well, here's some things that they've said.
6 The Court -- the Supreme Court concluded that the
7 government's interest in effective law enforcement
8 was insufficient to justify killing fleeing felons
9 who did not pose a significant threat of death or
10 serious injury to anyone.

11 Q. Now, do you have an opinion as to whether

12 Mr. Smith posed a threat of significant injury or
13 death to others?

14 A. I do not; I do not.

15 Q. One way or another?

16 A. He did not pose a threat to anyone.

17 Q. Oh, I'm sorry. All right. Now, would you
18 take a look -- what leads you to the conclusion
19 that he did not pose a threat to anyone?

20 A. Because in the -- during the entire chase,
21 which as I looked back, took not 30 minutes, but
22 more like five minutes.

23 Q. Are you changing your testimony?

24 A. I am because as I went back and looked at
25 his testimony, it didn't last but about five

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1 minutes. In that time -- in that five-minute
2 span, he ran over no one. He didn't have any
3 crashes.

4 Now, that doesn't say he wasn't
5 reckless, but nevertheless no one got hurt. The
6 one time somebody almost got hurt was when
7 Detective Ciritella stepped in front of the car.
8 That was the only time anyone ever said someone
9 was in danger. And by the fact -- and you
10 previously asked me about does the length of a
11 chase make a difference, and it doesn't, but in a
12 case where a chase only lasts five minutes, that's
13 significant in the sense that it didn't last long

14 enough to pose threats to too much of anybody.

24 Q. Now, you indicate on page -- looks like page
25 9 of your report that the explanations offered by

125

1 these officers for their actions is questionable.

2 What explanations are questionable?

3 A. The explanations as to why they fired so
4 many shots. The unlikelihood of some of the
5 circumstances as they evolved. Detective
6 Ciritella states that he was in front of the car,
7 and he was telling the man the stop. But yet he
8 also said he was beside the building taking
9 cover.

10 Now, if the car was going to run into
11 him, surely he would have hit the building. You
12 know, if I'm standing beside a building as a
13 police officer, and then somebody coming at me,
14 they have a choice to hit the building or go some
15 -- a different direction. That's one part.

16 The fact that when the officers were
17 shooting from behind, they couldn't even see in
18 the car because there's a partition that keeps
19 offenders in the back and the police in the front,
20 but when you're behind the car outside, you can't
21 see. You can barely see through a police car.
22 You can hardly see the driver because that's where
23 usually there's a metal or some type of

24 reinforcement.

25 Q. So if that's the case and if Mr. Smith were

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1 slumped over and unconscious, they wouldn't be

2 able to see that, would they?

3 A. If they were close, which they stated they

4 were within feet.

5 Q. Oh, then they could see in the car?

6 A. Yes.

7 Q. Oh, well, then why were you telling me about

8 this -- something about the partition?

9 A. Because -- it's important because we have --

10 you asked me about the plausibility of what they

11 said. You're asking me -- here I said that the

12 explanations offered by these officers for their

13 actions is questionable.

14 Now, I did not see anything from any of

15 them that justified shooting the number of times

16 they did. They didn't see a target, obviously,

17 but they said they did. This is where I'm talking

18 about their actions are questionable, and as a

19 police officer who was involved in and witnessed

20 many controversial situations, it tells me that,

21 you know, it was possibly an attempt to legitimize

22 an illegitimate action.

23 Q. Do you find fault with the fact that they

24 did not write a report on their actions?

25 A. I do.

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1 Q. Why is that?

2 A. Because every police shooting that I've ever
3 been involved in or witnessed, the police officers
4 had to give an account of their story. That's the
5 fundamental basis of the investigation.

12 Q. Keep going. What other deficiencies are

13 there beside the two you've mentioned so far?

14 A. Middle -- middle ways to -- well, really --

15 let's see, what line? It says here -- where we're

16 talking about Ciritella, it said that the stolen

17 police vehicle slowed down as if to stop near the

18 corner of Fifth and North Harrison Streets. The

19 officers approached the vehicle with their service

20 weapons drawn and ordered the victim out of the

21 vehicle.

22 Then here's the deficient part: The

23 victim then accelerated the stolen police vehicle

24 toward Detective Ciritella, who was standing on

25 the side of the street near the curb.

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1 Now, what I see deficient in that is

2 this: How can a man be standing on the curb and

3 have his life in danger by being in the street?

4 This report says that he was on the curb.

5 Q. All right. So there's a discrepancy because

6 in the report says he's on the curb and Ciritella

7 said he's in the street?

8 A. Right.

9 Q. Now, you have told me repeatedly that

10 Ciritella was in the middle of the street.

11 A. That's what he said he was in -- I -- I said

12 middle. You keep saying I said middle. If I said

13 middle, I said in the street --

14 Q. Okay.

15 A. -- he didn't say middle.

16 Q. You don't know where in the street he was?

17 A. I don't know, but he did say he was in the

18 street. This says he was on the curb.

19 Q. All right. So if he were one foot from the

20 curb, would that be a material difference between

21 what he said and what the report says?

22 A. Absolutely because if he was one foot off

23 the curb -- well, no, it wouldn't make a

24 difference because if he was one foot off the

25 curb, he'd still be in front of a parked car.

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1 Q. Okay. All right.

2 A. So he wouldn't be in danger.

3 Q. What other discrepancies or deficiencies are

4 there in this report?

5 A. That's pretty much the ones that I see.

-

9 Q. Now, having reviewed the report at some

10 additional length, are there other items that

11 you'd like to point to which you believe to be
12 deficient?
13 A. Well, in Ciritella's statement he says
14 that -- let's see. Yes, here on Ciritella's
15 statement in the State's -- the Attorney General's
16 statement it says that the victim then accelerated
17 the stolen police vehicle toward Detective
18 Ciritella, who was standing on the side of the
19 street near the curb, but in Ciritella's statement
20 it says as the vehicle stopped, I gave verbal
21 commands for him to turn the car off, step out of
22 the vehicle, I know at which point again as I'm
23 fearing he doesn't see me.

24 And the conflict I see is here he's
25 saying that he was in a situation where he didn't

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1 think the offender even saw him, and here it says
2 that he was on the curb in danger of getting hit.

3 Q. Would you tell me what page of the
4 deposition of Ciritella you're reading from?

5 A. That is on page 55, 13 to 24.

6 Q. Okay. And what page of the Attorney
7 General's report are you . . .

8 A. Page 2, a little bit more than halfway down
9 the page.

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8 materials whether Marilyn Garcia was hit directly
9 or by ricochet.

10 A. I'm not an expert on ballistics, but one
11 thing we did learn in the Academy and in my
12 training with weapons is that the hollow-point
13 bullets don't ricochet.

14 Q. Never?

15 A. I can't say never, but we were told that the
16 difference between the regular bullet and the
17 hollow point is that the hollow point explodes on
18 impact, the bullet continues its path.

19 Q. Is it fair to say that the event lasted a
20 mile or that the length in terms of distance and
21 the length in terms of time was determined by the
22 defendant police officers' decision rather than
23 anything that was independently done by Harry
24 Smith?

25 A. It was their decision.

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1 Q. Is it fair to say that the defendant
2 officers could have selected a different place and
3 a different time to establish a roadblock?

4 A. This is what I referred to when I was
5 responding to his question was there something
6 else that they could do. They -- if that one
7 didn't work, they could have tried it again.

8 Q. Is it your opinion that a second roadblock
9 may have been more effective because Harry Smith
10 was shot multiple times at the first roadblock?

11 A. That's certainly a valid consideration.

12 Q. Is it fair to say in your opinion that these

13 defendant officers were not forced to make a

14 split-second decision?

15 A. I agree to that. They did not have to make

16 a split sec -- a split-second decision to use

17 deadly force.

13 Q. Would the -- in your experience and in your

14 opinion, would the responding officers, based upon

15 the information provided about shots fired --

16 would they seek additional information before

17 making the decision that they're going to use

18 deadly force?

19 A. Yes.

20 Q. And how is that -- can you explain your

21 response?

22 A. Yes, a responding unit would normally ask

23 what do we have here, squad? What are we chasing

24 this guy for? Does he have a weapon? Who has

25 been shot?

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1 These are the normal, natural questions

2 that come over the radio to guide the police to

3 keep them from making a mistake.

4 Q. Do you know of any situation where a call

5 for shots fired or officer needs assistance is

6 made and there not being additional information

7 before officers get out and use deadly force, not
8 be additional information about the condition of
9 the officer or officers making the call like
10 officer injured or officer down or
11 something of that nature?

12 A. No.

13 Q. In the absence of hearing officer down,
14 officer injured, what would a reasonable police
15 officer assume had occurred?

16 A. That it wasn't the offender that had the
17 shot, that did the shooting because if they had,
18 you would have heard officer down, shots fired at
19 an officer, those things, and, see, what I'm
20 trying to explain is this is like a marriage day.
21 You don't forget what happened on your marriage
22 day.

23 When you're involved with a shooting,
24 you make sure that you know everything that's
25 going on and everything that's happened. You're

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1 going to make sure that you know that a police
2 officer has been hurt or not been hurt because
3 that's going to determine your personal response
4 as you enter the conflict.

20 Q. Are there any of the shots fired -- there
21 were 31 shots fired at the intersection and on the
22 street of Fifth and Harrison. Are there any of

23 those shots fired of the 31 that you think were

24 appropriate for police officers to fire?

25 A. From what I read in the documents and my

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1 pictures of the dowel rods in the squad car, I see

2 no justifiable shots.

9 MR. PARKINS: It would be

10 Exhibit 6.

11 MS. SULTON: No, we have a

12 couple of other pictures here that have not yet

13 been marked, and you mentioned pictures in plural,

14 so take a look at this one photo that hasn't been

15 marked -- oops -- and see if -- you're also basing

16 your opinion on that, so we'll mark that.

17 A. Well, what this tells me is that by the fact

18 that these bullet markings show that they were

19 shooting at a car that was going away from them,

20 not necessarily coming at them.

21 Q. So none of the 341 shots in your opinion

22 were -- well, let me put it this way: Were all of

23 the 31 shots fired an excessive use of force?

24 A. Yes.

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10 Q. And are you referring to policy 6.3?

11 A. Yes, I am.

12 Q. So as you sit here today, it's your

13 understanding that the shotgun was supposed to be

14 placed in the trunk?

15 A. Yes.

23 And let me take your back to paragraph
24 27 of your report on page 4. Is there anything
25 that you have reviewed that leads to believe that

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1 Mr. Smith was attempting to evade arrest by flight
2 once Detective Ciritella began firing his gun?
3 A. No, I believe at that point he was trying to
4 escape pain.

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1 C E R T I F I C A T E
2 S T A T E O F T E N N E S S E E :
C O U N T Y O F S H E L B Y :

3

I, DANA MAY WEBB, Court Reporter and
4 Notary Public, Shelby County, Tennessee, CERTIFY:

5

The foregoing proceedings were taken
6 before me at the time and place stated in the
foregoing styled cause with the appearances as
7 noted.

8

Being a Court Reporter, I then reported
9 the proceedings in Stenotype, and the foregoing
pages contain a true and correct transcript of my
10 said Stenotype notes then and there taken.

11

I am not in the employ of and am not
12 related to any of the parties or their counsel,
and I have no interest in the matter involved.

13

14 I further certify that in order for this
document to be considered a true and correct copy,
15 it must bear my signature seal, and that any
reproduction in whole or in part of this document
16 is not authorized and not to be considered
authentic.

17

18 Witness my signature this, the 29th day
of September, 2006.

19

20

DANA MAY WEBB, Court Reporter

21

22 Notary Public at Large
For the State of Tennessee

23

My Commission Expires:

24

May 28, 2008